Supreme Court, U.S.
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No. 04-1335

IN THE

Supreme Court of the United States

THOMAS GEIG,

Petitioner,

v.

CITY OF MACEDONIA, OHIO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioner Thomas Geig was given a ticket for disobeying a City of Macedonia, Ohio, traffic law that prohibited a left-turn-lane change in a right-turn-only lane. He was found guilty of that offense in the Macedonia Mayor's Court. The mayor's court was presided over by a licensed attorney (magistrate) who is appointed by the city's mayor pursuant to Ohio Revised Code § 1905.05. Geig appealed the decision of the magistrate to the Cuyahoga Falls municipal court, where he is entitled to a *de novo* trial. The traffic violation charge was ultimately dismissed against Geig. Geig could have pled not guilty and requested a jury trial, or simply refused to waive his right to a jury trial, which would have resulted in an immediate transfer to the Cuyahoga Falls municipal court. Ohio Rev. Code §§ 1905.01, 2937.08.

Geig claimed that the magistrate's at-will employment status and the mayor's appointment of that magistrate *per se* violates the requirements of due process. The District Court disagreed. The Sixth Circuit issued a one-page, slip opinion adopting the District Court's rationale and affirmed the dismissal of Geig's complaint. Upon Geig's petition for rehearing *en banc*, not only did the original panel members review and reject rehearing, but not one of all of the active judges of the Sixth Circuit requested a vote on the suggestion of rehearing *en banc*.

The Petition raises the following issue that was fully considered and properly decided below:

1. Can an Ohio mayor appoint an attorney as a magistrate to preside over a mayor's court without violating a criminal defendant's guarantee of the right to due process under the Fourteenth Amendment when the magistrate has a fixed salary not dependent on whether he convicts or does not convict, has no responsibility for the financial interests of the City, and the mayor does not review or approve the decision?

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STATEMENT OF FACTS

a. Background

On June 20, 2001, Petitioner Thomas Geig was cited for disobeying Macedonia traffic laws by making a left-turn-lane change in a right-turn-only lane. Officer Bryan Vince issued a summons that ordered Geig to appear in the City of Macedonia Mayor's Court.

On June 28, 2001, Geig entered a plea of "not guilty" and Defendant Magistrate David Engle accepted the plea and set his trial for July 12, 2001. On July 12, Magistrate Engle presided over the case in which Geig represented himself *pro se* to contest the charges. After hearing the evidence from Officer Vince and Geig, Magistrate Engle found Geig guilty and imposed a fine of $60 and court costs of $70.

Geig appealed the Mayor's Court decision. Under Ohio law, the timely filing of a Notice of Appeal in Mayor's Court vacates the judgment of a Mayor's Court. Geig was entitled to and requested a *de novo* appeal in the Cuyahoga Falls municipal court. On July 20, 2001, the Cuyahoga Falls Municipal Court received the notice of appeal Geig filed with the Mayor's Court. On September 19, 2001, the City of Macedonia prosecutor requested that the Municipal Court dismiss the case against Geig.

Ohio mayors are authorized by statute to appoint a magistrate to preside over any prosecutions that may be tried in mayor's court. R.C. § 1905.05. The magistrate is vested with the same power as the mayor to decide prosecutions, enter judgment and impose sentences; the judgment and sentence are not subject to the appointing mayor's review or approval "and have the same force and effect as if they had been entered or imposed by the

mayor." R.C. § 1905.05(A). Magistrate Engle's decisions were not subject to the appointing mayor's review or approval. R.C. § 1905.05. Magistrate Engle's compensation is not dependent on whether he convicts or does not convict a criminal defendant in mayor's court. The guaranteed pay range for a magistrate is $60 to $64 per hour, as set by the legislative authority (i.e., the City Council). (*Id.*)

After the traffic case had been dismissed, Geig filed a Complaint against the City of Macedonia, Magistrate David Engle, Mayor Barbara Kornuc and others. The District Court granted Defendants' Motion to Dismiss in its entirety and the Sixth Circuit affirmed that decision. Geig now seeks review in this Court. The City of Macedonia is the only party defendant to this appeal.

b. Clarification of the Record

Geig improperly interjects into the record a newspaper article that was attached to his Complaint and incorporate that information into his statement of the facts to this Court. (*See* Pet. at 6-7, last partial paragraph and first partial paragraph, respectively.) That article was entitled *Northfield Mayor Fires Magistrate* that appeared in the *Akron Beacon Journal* in 1998. The article does not relate to the Macedonia mayor, who was a defendant in this case, and notes that magistrate Engle was hired as Northfield's magistrate. Pursuant to Sup. Ct. R. 15.2, Respondents object to the inclusion of this information as part of the competent record before this Court for review of a 12(b)(6) motion to dismiss.

Despite the attempts of Geig to convince this Court otherwise, there is neither a conflict among the courts of appeals nor a misapplication of the well-established "possible temptation"

test, articulated by this Court almost 75 years ago in *Tumey v. Ohio*, 273 U.S. 510 (1927). Further, any alleged violation is not the result of a custom, policy, or practice of the City of Macedonia, but, rather, is the result of compliance with Ohio Revised Code § 1905.05. This Court should deny this Petition.

REASONS FOR DENYING THE PETITION

1. There is no conflict.

Geig struggles to generate a conflict where none exists. This Court has decided a trilogy of cases on Ohio's mayor's courts that provides ample guidance to the Sixth Circuit and the lower courts. *See Tumey v. Ohio*, 273 U.S. 510, 523 (1927); *Dugan v. Ohio*, 277 U.S. 61 (1928); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972). The Sixth Circuit is also well qualified to apply that law to the present case, as it has done so, and in other cases involving Ohio mayor's courts. *See, e.g.*, *DePiero v. City of Macedonia*, 180 F.3d 770 (6th Cir. 1999) (finding then-mayor DiPiero himself could not preside over the mayor's court). While devoid of direct or real conflict among courts, Geig primarily relies on state cases that are far a field – factually and legally – from the present dispute.

Geig cites to a Louisiana court that determined counsel cannot stipulate that the district attorney choose the judge to be assigned to a capital or felony case, but that it must be done on a random basis. *State v. Simpson*, 551 So.2d 1303 (La. 1989). Having nothing to do with mayors' courts or the direct application of the specific law here (i.e., the "possible temptation" test), the *Simpson* case provides no "compelling" reason to accept certiorari as contemplated by Sup. Ct. R. 10. Similarly uncompelling is Geig's argument that a California court's concern over the selection of temporary administrative hearing officers

on an *ad hoc* basis is akin to the situation at bar. *Haas v. County of San Bernardino*, 27 Cal.4th 1017 (Cal. 2002). Acknowledging that the issue it addressed was "limited in scope," the *Haas* court identified the problem as the lack of specific legal, ethical, or professional standards governing temporary hearing officers. *Id.* at 1036-37. In the present case, the magistrate pursuant to state statute is a permanent at-will employee who has a fixed salary and is governed by Ohio's legal, ethical and professional rules for attorneys and judges. Finally, in *Pulaski County Municipal Court v. Scott*, 612 S.W. 2d 297 (Ark. 1981), Geig cites to a decision that addressed the application of the Arkansas constitution and the issue of whether a judge with county-wide jurisdiction must be elected or could be appointed under that constitution. In *Scott*, the greater number of judges (i.e., three) found that the appointment of a judge by another judge was constitutionally permissible under the Arkansas constitution. Engaged in an admittedly "dangerous" practice, two other judges concluded they objected to the appointment of judges but had written the concurrence "without the benefit of briefs and arguments on the subject" and without the issues having been "fully developed in the traditional adversary manner." *Id.* at 123. Two separate judges never reached the issue at all. While the lower trial court in that case apparently found the practice of appointment invalid and the judges at the appellate level approving of the practice did not constitute a majority, the lower court's decision was affirmed. In sum, the Arkansas case fails to present a conflict between a high state court and the Sixth Circuit's decision in this case or a compelling reason to address the present issue regarding Ohio's mayor's courts.

Confronted with the fact that no square conflict exists in the state courts, Geig stretches the Fifth Circuit's decision in *Brown v. Vance*, 637 F.2d 272 (1981) to demonstrate a purported

conflict in the federal courts.[1] But, upon a cursory examination, the *Brown* case is easily distinguishable. Indeed, the *Brown* facts fit squarely within the classic prohibition that a judge who has a "direct, personal, substantial pecuniary interest" in a case deprives a defendant of due process of law, as this Court held in *Tumey, supra*. That is clearly not the issue here. In *Brown*, the Fifth Circuit determined whether a statutory fee system compensating lay "judges" is unconstitutional when the "judge's compensation depends on the number of cases filed in his court." The lay judges in *Brown* received $6 per criminal case and $8 per civil case. The record supported that creditors would file more frequently in courts of judges who tended to favor plaintiffs and the judges knew and understood this practice. The critical distinguishing feature of the *Brown* case is that the compensation of the lay judges was a "direct, personal, substantial pecuniary interest." The compensation of the magistrate in the present case is statutorily fixed and is not dependent on whether he convicts or does not convict a defendant. Further, and unlike the lay judges in the *Brown* case, the magistrate was and must be an attorney.

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1. Geig also cites to *Chicago Teachers Union Local No. 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292 (1986), presumably to demonstrate a perceived conflict with the decision of this Court. That case dealt with the factually distinguishable situation of a challenge to an arbitration procedure in a collective bargaining contract. In *Hudson*, the Supreme Court found a litany of defects in a procedure that was *completely controlled* by the Union. The *Hudson* case addresses compulsory payments by non-union employees to unions where the funds are used in part to support political speech or action with which the non-union objectors disagree. The present case does not deal with arbitration, the selection of an arbitrator, or the First Amendment. Magistrate Engle's decisions are not subject to the appointing mayor's review or approval *See* R.C. § 1905.05. Mayor Kornuc cannot reasonably be said to completely control the mayor's court. The *Hudson* case poses no conflict.

2. There is no "compelling" basis for revisiting the application of the "possible temptation" test in this case.

"A petition for a writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. Geig's plea to this Court to revisit the "possible temptation" test articulated in *Tumey v. Ohio*, 273 U.S. 510, nearly 75 years ago provides no compelling ground warranting review by this Court.

The possible temptation test provides the framework for determining whether a decision maker is constitutionally disqualified. The test can be stated as follows: Whether the situation is one "which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused . . ." *Tumey v. Ohio*, 273 U.S. 510, 532 (1972). The test remains unchanged for more than seven decades. There is no dispute that the district court applied the "possible temptation" test to the facts of this case. Geig – not surprisingly – would like this Court to apply the test in a way favorable to him, but surely this Court has more pressing business than to reconsider the application of a test that has been applied by countless courts – as well as the lower courts in present case.

The case of *Dugan v. Ohio* is the most analogous mayor's court case to this dispute. The *Dugan* case demonstrates that the power of a mayor to appoint a magistrate of the mayor's court does not deprive the plaintiff of due process of law, so long as the compensation of the judge is not dependent upon the conviction of any defendant. *Cf. Dugan v. Ohio*, 277 U.S. 61 (1928). In *Dugan*, the Supreme Court held that the mayor's relationship to city finances and financial policy was too remote to presume bias toward conviction in prosecutions before him

as a judge. The mayor in that case had judicial functions but only very limited executive authority. The city was governed by a commission of five members, including the mayor, which exercised all legislative powers. A city manager, together with the commission, exercised all executive powers. In the present case, similar to the mayor in *Dugan*, Magistrate Engle exercised only judicial authority and had *no* executive authority. Moreover, Magistrate Engle had *no* direct relationship to the city's finances or the city's financial policy.

The lower courts refused to make the assumption that Magistrate Engle could "possibly" be "tempted" on the theory that he would be swayed like the branches of a willow tree in a brisk wind because he was appointed, rather than elected to a guaranteed term. Geig assumes too much. Nothing in the trilogy of Supreme Court cases on mayor's courts (i.e., *Tumey*, *Ward*, *Dugan*) remotely indicates that the mayor's appointment of a magistrate would violate due process.

3. This case provides no significant constitutional question warranting review.

This Court has recognized that not "all questions of judicial qualification . . . involve constitutional validity . . . thus . . . remoteness of interest would seem generally to be matters merely of legislative discretion." *Tumey v. Ohio*, 273 U.S. 510, 523 (1927). "Most matters relating to judicial disqualification [do] not rise to a constitutional level." *FTC v. Cement Institute*, 333 U.S. 683, 702 (1948).

While Geig claims that an appointed attorney/magistrate presiding over a mayor's court is a "biased and rigged system" and that the appointment is an indirect attempt to "defy" *Tumey* and *Ward* in a "brazen way," the contention overstates the scope

of those decisions or even a reasonable interpretation of when judicial disqualification reaches a constitutional level. (Pet. at 15.) Geig goes too far in marrying the present case to the precedent found in *Ward* and *Tumey*. The *Tumey* Court held that a judge who has a "direct, personal, substantial pecuniary interest" in a criminal case deprives a defendant of due process of law. *Tumey*, *supra*, at 522. In *Ward*, the Court held that when a mayor has "wide executive powers," is the "chief conservator of the peace," and a "major part of village income is derived from the fines, forfeitures, costs, and fees imposed by him in his mayor's court," the mayor has an improper interest in the proceedings. *Ward*, *supra*, at 58. Cases in which bias has been found to exist, in violation of due process, involve one of those two situations. Geig in his Complaint does not allege either of the situations mentioned above that would establish an actionable claim for violation of due process. These situations are classic examples of what could constitute possible due process violations of criminal defendants. Neither of these situations is presented in this case. Magistrate Engle's compensation is the same whether he convicts or does not convict. Magistrate Engle exercised only judicial functions and had no responsibility for the financial needs of the City of Macedonia. The magistrate's decisions are not subject to the appointing mayor's review or approval. *See* R.C. § 1905.05. Finally, the magistrate's decision in the mayor's court is subject to an absolute right to appeal and the criminal defendant is entitled to a *de novo* trial on the matter. Magistrate Engle's presiding over the Macedonia Mayor's Court simply does not violate a criminal defendant's guarantee of right to due process under the Fourteenth Amendment.

The distance between the examples of "constitutionally unacceptable bias that deny a defendant due process of law" found in *Tumey* and in *Ward* and the facts of the present case is vast. In the context of a system in which this Court and the Sixth

Circuit "has **not** found any fatal defect in the overarching system that permits a mayor simultaneously to exercise some combination of executive and judicial functions," the appointment of an attorney/magistrate who is required to uphold ethical, professional, and legal responsibilities should not be presumed to be biased *per se* merely by appointment by the mayor. *See DePiero v. City of Macedonia*, 180 F.3d 770, 777 (6th Cir. 1999). In fact, the law is well established that the presumption is the exact opposite: "The law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea." *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 820 (1986) *citing* 3 W. Blackstone, Commentaries *361.

CONCLUSION

This Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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